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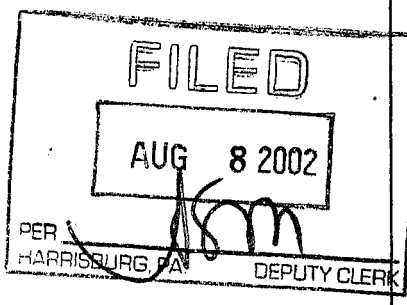
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

EDWARD ACKERMAN,	:	
	:	
Petitioner	:	
	:	CIVIL NO. 1:CV-01-1048
v.	:	
	:	(Judge Caldwell)
JOHN McCULLOUGH,	:	
	:	
Respondent	:	



M E M O R A N D U M

I. Introduction.

Edward Ackerman, an inmate at SCI-Houtzdale, Pennsylvania, filed this pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Ackerman is challenging his Pennsylvania state court convictions for rape, involuntary deviate sexual intercourse, aggravated indecent assault, indecent assault, simple assault and terroristic threats. He was tried twice when the first jury hung on some of the charges. His aggregate sentence is four and one-half to thirteen years.

The petition raises five claims. The first two claims are based on double jeopardy. Ackerman argues that the Double Jeopardy Clause prohibited the second trial because there was no manifest necessity to declare a mistrial in the first one. Ackerman also argues that the Double Jeopardy Clause prohibited his retrial on the greater offense of rape after he was convicted of the lesser-

included offense of indecent assault in the first trial. Included in this claim is an argument that the Commonwealth deliberately delayed his sentencing on his convictions in the first trial for more than three years.

Ackerman's third and fourth claims are based on his belief that a Pennsylvania State trooper recorded a statement he had made that was not turned over to the defense. In the third claim, he asserts that his trial counsel was ineffective in not obtaining a copy of this statement and in the fourth claim that the Commonwealth violated its obligation to produce exculpatory evidence by not turning over a copy of the statement.

Finally, Ackerman's fifth claim is that the Commonwealth should have conducted DNA tests of hair from the rape kit because the identity of the victim's attacker was at issue in the trial.

For the reasons set forth below, we will deny the petition.

II. Background.

The evidence at trial established the following. The victim had spent the evening dancing at the Valley View Hotel in the Village of Nuremberg. She had observed Petitioner there drinking. The victim testified that while she walking home in the early morning of November 10, 1991, Ackerman grabbed her and dragged her into a yard. She managed to escape, but he caught her and again

dragged her into the yard. He bit her face and hands. She escaped again, and he caught her again. He then dragged her through a field, across a street, and at one point pounded her head on the ground. He towed her by the hair and one hand into his home and into his bedroom.

The victim was ordered to undress. Petitioner bit her and pinched her breasts. He forced his penis into her vagina, anus and mouth. He pulled clumps of hair from her head and saved one clump in a book. During the course of the attack, the victim's shoes and glasses were lost in the yard adjacent to Ackerman's home, and the victim lost a pair of simulated pearls in his bedroom.

The victim was treated at the Hazleton State Hospital for various bruises and bite marks to her face, hands, back and breast area. Samples were taken for processing with a rape kit. No seminal fluid or semen was found. Hair samples were taken from the victim, consisting of strands of pulled and cut hair. At trial, an expert testified that the hair samples matched those taken from the crime scene.

Trooper Francis McAndrews of the Pennsylvania State Police investigated the crime. Ackerman's mother admitted McAndrews and other officers into Ackerman's bedroom where hair samples and the victim's pearls were found. Her shoes and glasses were recovered in the yard next to the home.

McAndrews told Ackerman's mother that he wished to speak to her son. Later that day, Ackerman telephoned McAndrews. As McAndrews related their conversation at trial, Petitioner admitted he had had sex with the victim but said that it was consensual. According to Ackerman at trial, he had not only denied to McAndrews that he had raped the victim but he also denied that any sex had taken place. McAndrews thinks that he might have taken notes during the conversation but that he had no written statement at the time of trial, if one had ever existed, concerning the telephone conversation with Petitioner.

Petitioner was charged with kidnapping, unlawful restraint, rape, involuntary deviate sexual intercourse, aggravated indecent assault, indecent assault, aggravated assault, simple assault, recklessly endangering another person, and terroristic threats.

Ackerman's first trial began on Thursday, November 2, 1992. At the conclusion of the Commonwealth's case, the court dismissed the charges of unlawful restraint, aggravated assault, and recklessly endangering another person. The jury began deliberating on Monday, November 2, 1992, at 12:05 p.m. At 2:03 p.m., they returned to the courtroom, seeking additional instructions. The jury resumed deliberations at approximately 2:16 p.m. (Doc. 23, 11/02/92 Trial Transcript, p. 364). They returned to the courtroom at 3:40 p.m., having difficulty resolving some of the charges and

indicating that "there is some deadlock," in the words of the trial judge. (Doc. 23, Id., pp. 364-66; Exhibit D, pp. 10-12). The court stressed to the jury the importance of the proceedings and asked them to return to the jury room to discuss whether additional instruction would help them, but that if they did to think they could make any progress, to return to the courtroom. The jury began further deliberations at 3:43 p.m. (Doc. 23, N.T. 365-67).

About twenty minutes later, at 4:05 p.m., they returned to the courtroom. The court asked the foreperson if additional or clarifying instructions would help. She said no. (Doc. 23, N.T. 368). The court then asked if she thought they could reach a unanimous verdict. She said no. (Doc. 23, N.T. 369). Finally, the court asked if there was a factual dispute they could not agree on and she said yes. (Doc. 23, N.T. 369).

The court told the jury to indicate on the verdict slip which charges they had reached a unanimous verdict on, and on which charges they were deadlocked. (Id. at p. 370).

The jury left the courtroom at 4:10 p.m. and returned at 4:12 p.m. with a completed verdict form. They had found Ackerman guilty of indecent assault[1] and simple assault.[2] On the remaining charges, the court asked each juror whether they agreed there was a

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[1] 18 Pa. C.S.A. § 3126 (1991).

[2] 18 Pa. C.S.A. § 2701(a)(1)(1991).

"hopeless deadlock that cannot be solved by further negotiations." (Id. at 372). Each responded affirmatively. Id. The court then declared a mistrial on the remaining charges of kidnapping, rape,[3] involuntary deviate sexual intercourse ("IDSI"),[4] aggravated indecent assault,[5] and terroristic threats.[6]

Ackerman filed post-trial motions raising double jeopardy as a bar to his retrial on the unresolved charges. The trial court denied the motion, explaining that it had found manifest necessity because the testimony had only taken about eight hours, the issues were not complex, and each juror indicated individually that they would not be able to reach a verdict on the remaining charges. (Trial court's opinion, dated June 21, 1994 at pp. 11-12). On interlocutory appeal, the superior court affirmed. In April 1995, the Pennsylvania Supreme Court denied Ackerman's petition for allowance of appeal.

In September 1995, Ackerman had his second trial. He was found guilty of rape, IDSI, aggravated indecent assault, and terroristic threats. On October 31, 1995, he was sentenced to a term of four-to-twelve years for rape, a concurrent term of four-

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[3] 18 Pa. C.S.A. § 3121 (1991).

[4] 18 Pa. C.S.A. § 3123 (1991).

[5] 18 Pa. C.S.A. § 3125 (1991).

[6] 18 Pa. C.S.A. § 2706 (1991).

to-twelve years for involuntary deviate sexual intercourse, a concurrent term of one-to-twenty-four months for simple assault, and a consecutive term of six-to-twelve months for terroristic threats. The remaining convictions merged for sentencing purposes. In October 1996, Petitioner's appeal to the superior court was denied.

Petitioner then sought relief under the Pennsylvania Post Conviction Relief Act (PCRA). See 42 Pa. C.S. § 9541-9546. The trial court denied relief, and the superior court affirmed in October 1999. On June 6, 2000, the state supreme court denied a petition for allowance of appeal. This 2254 petition followed.

III. Standard of Review.

Under section 2254, a federal habeas court reviews state criminal convictions for violations of "the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). When a federal-law issue has been adjudicated on the merits by a state court, the federal court reverses only when the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). See generally, Moore v. Morton, 255 F.3d 95, 104-05 (3d Cir. 2001).

Additionally, resolution of factual issues by the state courts are presumed to be correct unless the petitioner shows by clear and convincing evidence that they are not. 28 U.S.C. § 2254(e)(1). Further, a petitioner must have exhausted state-court remedies before filing a federal habeas petition. See 28 U.S.C. § 2254(b)(1)(A).

IV. Discussion.

A. Whether the Trial Judge Properly Declared a Mistrial on the Basis of Manifest Necessity.

Ackerman argues that the trial judge's declaration of a mistrial at the end of the first trial was without manifest necessity and precluded his retrial on the remaining charges as a violation of the Double Jeopardy Clause.

Mistrials may be declared absent the defendant's consent "when, 'taking all the circumstances into consideration, there is a manifest necessity for the [mistrial], or the ends of public justice would otherwise be defeated.'" Love v. Morton, 112 F.3d 131, 133 (3d Cir. 1997) (internal citations omitted). "To demonstrate manifest necessity, the state must show that under the circumstances the trial judge 'had no alternative to the declaration of a mistrial.'" Id. at 137. Reviewing courts must afford considerable deference to the trial court's determination

that manifest necessity warranted a mistrial. Arizona v. Washington, 434 U.S. 497, 511, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). However, the courts cannot condone a trial judge who acted "irrationally or irresponsibly" in declaring a mistrial, id. 434 U.S. at 514, and a state court's failure to exercise "sound discretion" in declaring a mistrial may be grounds for federal habeas relief under 28 U.S.C. § 2254(d). If manifest necessity existed to declare a mistrial, the general rule that a "retrial following a 'hung jury' does not violate the Double Jeopardy Clause" will apply. United States v. Keene, 287 F.3d 229, 233 (1st Cir. 2002), *citing*, Richardson v. United States, 468 U.S. 317, 324 (1984).

In this case, Ackerman believes that Love's "no alternative" language essentially means that if there is any alternative, it has to be attempted; as Petitioner puts it, "[t]he defense need only show the trial court had viable alternatives to the declaration of a mistrial." (Doc. 15, p. 5). He also relies on Sanders v. Easley, 230 F. 3d 679, 685 (4th Cir. 2000), where the court stated that the declaration of a mistrial is a judicial power "to be used with the greatest caution, under urgent circumstances, and for very plain and obvious reasons." Petitioner advances the following alternatives to the mistrial: (1) the jury could have deliberated longer that evening; or (2) the jury could have returned the next

day and continued deliberations. He also points out that they only had one day of deliberations and only deliberated about three to four hours that day, indicating that they had not deliberated for very long on each charge.

As a federal habeas court, we only reverse state-court rulings if they are contrary to, or are an unreasonable application of, federal law. The state courts' decision on this double jeopardy issue was reasonable under federal law.

To begin with, the trial court is not obligated to explore all options. Rather, the availability of options is only one factor to be considered. See Crawford v. Fenton, 646 F.2d 810, 818 (3d Cir. 1981). Second, that only a few hours were spent in deliberations also did not militate against a mistrial. See United States v. Brahm, 459 F.2d 546, 550 (3d Cir. 1972)(five hours of deliberation were sufficient); United States v. Feijoo-Tomala, 747 F. Supp. 181, 185 (E.D.N.Y. 1990)(collecting cases). Additionally, the court asked the jury to continue deliberations after they initially revealed their deadlock. Further, only after the jury returned a second time, still unresolved, and after the forewoman represented that no further clarification of the charges or negotiations would assist them in breaking their deadlock, did the trial judge declare a mistrial. See Feijoo-Tomala, supra, 747 F. Supp. at 185 ("the jury's own statement that it is unable to reach a verdict is the

most crucial factor"). Moreover, upon their return, the trial judge polled each juror as to whether they were deadlocked on the remaining charges. In these circumstances, the trial judge did not violate the Double Jeopardy Clause by declaring a mistrial.[7]

B. Whether Ackerman's Retrial on the Rape Charge After His Conviction for Indecent Assault Violated Double Jeopardy.

Ackerman argues that the Double Jeopardy Clause barred further prosecution of the rape charge after his conviction on indecent assault in the first trial. He relies on precedent applying the rule established in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), that typically results in barring a trial either on the greater offense or a lesser-included one if the defendant has already been tried on either one of them. See Rutledge v. United States, 517 U.S. 292, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996). He notes that the Pennsylvania Superior Court has construed indecent assault to be a lesser-included offense of rape, citing Commonwealth v. Richardson, 232 Pa. Super. 123, 334 A.2d 700 (1975).[8]

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[7] United States v. Crosley, 634 F. Supp. 28, 32 (E.D. Pa. 1985), lists the factors to be considered in considering a mistrial.

[8] In material part, 18 Pa.C.S. § 3126 (1991) provided at the time of Petitioner's crimes that indecent assault is "indecent contact with another not his spouse" "without the consent of the other person." In material part, rape was defined as "sexual intercourse with another person not his spouse" "by forcible

Ackerman's general statement of the law is correct, but it ignores an important qualification of federal double jeopardy law. The Supreme Court recognizes that states may judicially interpret state-law crimes to create separate offenses depending upon the factual circumstances. See Brown v. Ohio, 432 U.S. 161, 169 and n.8, 97 S.Ct. 2221, 2220 and n.8, 53 L.Ed.2d 187, 196 and n.8 (1977). In Brown, the Court stated that there would have been no double jeopardy claim in that case (although perhaps a due process one) if the Ohio courts had construed the joyriding statute (one of the statutes at issue there) as creating a separate offense for each day the auto was operated without the owner's consent, thereby allowing Ohio to punish a defendant for both car theft and joyriding for a criminal episode occurring over several weeks. However, in the absence of such a judicial interpretation, a prosecutor could not avoid the bar of double jeopardy "by the simple expedient of dividing a single crime into a series of temporal and spatial units." Id. at 169, 97 S.Ct. at 2227, 53 L.Ed.2d at 196.

Looking to relevant Pennsylvania law, we note that the Pennsylvania Supreme Court permits convictions on separate crimes when there are facts in evidence beyond that which is necessary to

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compulsion" or "by threat of forcible compulsion . . . " 18 Pa.C.S.A. § 3121(a)(1) and (2)(1991).

establish the one offense and which support a conviction on the other. See Commonwealth v. Belsar, 544 Pa. 346, 350-51, 676 A.2d 632, 634 (1996)(quoting Commonwealth v. Weakland, 521 Pa. 353, 364, 555 A.2d 1228, 1233 (1989)). In Belsar, the state supreme court held that an aggravated assault committed by kicking the victim shortly after the defendant committed attempted murder by shooting the victim was a separate crime punishable with its own sentence because "the kicking attack was a separate incident that exceeded that which was necessary to accomplish the attempted murder." 544 Pa. at 351, 676 A.2d at 634.

This rule defeats Petitioner's double jeopardy claim. First, the criminal complaint charged Ackerman with indecent assault based on facts other than sexual intercourse with her. The complaint charged him with indecent assault "IN THAT HE DID bite, touch and feel [the victim's] breast and vagina." (Doc. 20, Criminal Complaint). It charged him with rape after he did "intentionally, knowingly or recklessly, engage in sexual intercourse with [the victim], NOT his spouse, by forcible compulsion or by threat of forcible compulsion . . ." (Id.). Second, the touching of the victim's breasts (pinching as the victim testified) is a fact beyond those necessary to establish the rape--sexual intercourse by force or threat of force. Under these circumstances, Pennsylvania

would consider Petitioner as having committed two separate offenses.

We note that on similar reasoning the state superior court in Commonwealth v. Richter, 450 Pa. Super. 383, 676 A.2d 1232 (1996), distinguished Richardson, supra, 334 A.2d 700, a case Petitioner cites to support his claim that indecent assault is a lesser-included offense of rape and hence barred by the Double Jeopardy Clause under Blockburger, supra. In Richter, the superior court upheld separate convictions and sentences for indecent assault and rape when the victim's ex-husband fondled her breasts and then forced intercourse upon her. The court reasoned that the act of fondling the victim's breasts was separate from the act of forcible intercourse and hence could sustain a separate conviction because it was not "a necessary ingredient" of the crime of rape. 450 Pa. Super. at 391-92, 676 A.2d at 1236. The court distinguished Richardson by noting that in that case the same act, forcible intercourse, was used to support the convictions for both rape and indecent assault.

Since two separate offenses are involved, Ackerman has no double jeopardy claim arising from a retrial on the rape charge after conviction on the indecent assault charge.

C. Delay in Sentencing on Simple-Assault and Indecent-Assault Convictions.

As part of his double jeopardy claim, Ackerman argues that the delay in sentencing him for over three and one half years (November 2, 1992, to October 31, 1995) on the two charges resulting in convictions in the first trial violated double jeopardy. Ackerman has the wrong amendment. It is the Sixth Amendment right to a speedy trial that guarantees a prompt sentencing. See Burkett v. Cunningham, 826 F.2d 1208, 1220 (3d Cir. 1987). The court must balance four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant. Id. at 1220 (quoting Barker v. Wingo, 407 U.S. 514, 530 (1972)). Prejudice is the most important factor. Burkett, 826 F.2d at 1220.

Weighing these factors, we find no violation of any right to a speedy sentencing. First, the reasons for the delay were valid. Ackerman was pursuing his double jeopardy rights on appeal, culminating on April 11, 1995, with the Pennsylvania Supreme Court's denial of Ackerman's petition for allowance of appeal on that issue. Also, the trial judge wanted to see which convictions would merge for sentencing purposes, and this had to await the outcome of the second trial. Second, Petitioner has not suffered any prejudice, nor has he alleged any, as a result of the delay in sentencing.

D. Trial Counsel Was Not Ineffective for Failing to Obtain a Copy of Ackerman's Statement to Trooper McAndrews Which Never Existed and There Was No Prosecutorial Misconduct in Withholding Such a Statement.

Petitioner's third claim is that trial counsel "failed to obtain a verbatim copy of the alleged statement made by the defendant" to Pennsylvania State Police Trooper Francis V. McAndrews, the criminal investigator assigned to the case who testified at both trials in this matter. (Doc. 1). Specifically, Ackerman is referring to a supposed statement prepared by Tpr. McAndrews reciting Petitioner's remarks during the phone call. If such a statement existed, it would have been relevant to McAndrews' and Petitioner's veracity because McAndrews testified that Ackerman admitted having sex with the victim but that it was consensual. On the other hand, Petitioner testified that he had said that they had not had sex. Petitioner's fourth claim is that the Commonwealth failed to produce this exculpatory statement.

We reject these claims. The state courts examined the factual issue concerning whether McAndrews had prepared a statement based on Petitioner's telephonic remarks. They concluded that no such statement existed, although McAndrews may have made notes that he did not keep. (Doc. 20, trial court PCRA opinion, September 1,

1998, p. 6 n.2; Superior Court opinion, Oct. 15, 1999, at p. 4).[9] It follows that counsel could not have been ineffective in not obtaining the statement and that the Commonwealth could not have failed to produce exculpatory evidence.[10]

E. The Alleged Failure to Test Hair in the Rape Kit For DNA.

Petitioner's final claim is that DNA testing should have been performed on hair samples taken from the victim at the hospital and made part of the Johnson rape kit. He asserts that identification

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[9]As noted above, we accept state-court factfinding. See 28 U.S.C. § 2254(e)(1).

[10]At the second trial, McAndrews testified on cross-examination concerning any writing he may have made in connection with the phone conversation as follows:

Q: And did you take notes of your conversation with him?

A: I may have.

Q: Do you have any of those notes?

A: I don't believe so.

(Id. at p. 328).

McAndrews also admitted that he did "recall writing" down Ackerman's comment that the sexual contact was consensual. "It was probably on a legal pad on my desk at the time." "I recall writing our, the facts concerning our conversation down possibly on a legal pad which was standard procedure for myself at my desk and incorporating that into the probable cause the following day, the following morning I should add." (Id. at pp. 330-331). However, McAndrews also stated that he did not keep those notes after incorporating them into his probable cause affidavit.

was an issue at the trial because of discrepancies in the victim's testimony in that regard and that testing the hair for DNA would establish his innocence.

We reject this claim. Petitioner does not identify whose hair it possibly could be (victim's or assailant's) or why testing it could exonerate him in light of the other evidence in this case.[11] The victim had seen Petitioner at the hotel that night, she testified he attacked her on the street and dragged her into his home, and her jewelry and clumps of her hair were found in his bedroom.

We also note that Petitioner has procedurally defaulted this claim, having failed to make a specific claim for DNA testing in the state courts.

WILLIAM W. CALDWELL
United States District Judge

Date: August 8, 2002

[11]If Petitioner is referring to the victim's hair pulled and cut for evidence, DNA testing would be immaterial since her identity is known.